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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1538

WILLIAM E. BARTH, - - - - - *Petitioner,*

v.

CITY OF LOUISVILLE, A Municipal Corporation;
ELI BROWN AND SONS, INC.; and
D. H. ROBINSON AND
E. F. RECTENWALD, - - - - - *Respondents.*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

OPINION OF THE STATE COURT.

The decision of the Court of Appeals of Kentucky on the appeal from the Jefferson Circuit Court was rendered and filed November 21, 1969, and is reported in 449 S. W. 2d 24.

A Petition for Rehearing was filed December 19, 1969, and was denied without a written opinion on February 6, 1970.

II.

JURISDICTION.

(A.) Petitioner's Statement of Jurisdiction is defective in that it does not comply with United States Supreme Court Rule 23(1)(b)(i and ii), 28 U.S.C.A. Petitioner has failed to show: (i) the date of the judgment sought to be reviewed and the time of its entry, and (ii) the date of any order respecting a rehearing.

(B.) Petitioner has attempted to invoke the jurisdiction of this Court to review the judgment in the Court of Appeals of Kentucky by writ of certiorari under 28 U.S.C. § 1257(3). Respondent submits that the statute does not confer jurisdiction in this situation.

(1.) *The judgment sought to be reviewed is not a final judgment.* 28 U.S.C. § 1257 provides that "final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed. . . ." The appeal from the Jefferson Circuit Court to the Court of Appeals of Kentucky did not end the litigation in the state courts. After the Court of Appeals of Kentucky affirmed the lower court, the action was transferred from the Chancery Branch to the Common Pleas Branch of the Jefferson Circuit Court for a jury trial on the question of compensation to be paid petitioner and the other objecting landowner, all pursuant to the judgment of the Jefferson Circuit Court, Chancery Branch, entered October 2, 1968 (Appendix D, Item 1). The trial of this action is now scheduled for June 16, 1970. Until the question of

compensation has been decided by a jury, as directed by the state statute in question, Kentucky Revised Statute (hereinafter KRS) 93.360, the rights of the parties have not been fully litigated. The state courts have not finally disposed of the whole matter in controversy and further proceedings at the trial level are necessary. After the jury verdict and judgment on the question of compensation, petitioner will have an opportunity to appeal the judgment to the Court of Appeals of Kentucky. At the present time, all possibilities afforded by state procedure for review by all state tribunals have not been exhausted. Any review by this Court at this time is premature.

(2.) *No federal question has been preserved for review.* The petition does not show that the constitutionality of the Kentucky alley closing statute was timely and properly raised so as to give this Court jurisdiction to review the judgment of the state court on writ of certiorari. Nor does it affirmatively appear from the record that any federal question was properly presented for decision to the Court of Appeals of Kentucky. Petitioner referred, in general terms, to the protection of the Fourteenth Amendment to the Constitution of the United States in his Amended Answer in the court of first instance (Record, p. 57) and in his Motion to Strike Specific Parts of Findings of Facts and Conclusions of Law (Record, p. 65) and in his Statement of Points on Appeal (Record, p. 85). Petitioner, in his brief to the Court of Appeals of Kentucky, referred to the Fourteenth Amendment to the Constitution of the United States only one time, *i.e.*,

where he summarized the nine defenses contained in his Amended Answer filed with the court of first instance (Brief for Appellant to Court of Appeals of Kentucky, page 12). At no point in his appellate brief did petitioner question the constitutionality of the Kentucky statute or present any argument that the statute was repugnant to the Constitution of the United States. The decision of the Court of Appeals of Kentucky, rendered November 21, 1969, makes no reference to the Constitution of the United States or any other federal question (Appendix D, Item 3). Petitioner also failed to raise a federal question or present argument in his Petition for Rehearing filed in the Court of Appeals of Kentucky. Petitioner, in his Reply to the City of Louisville's Response to his Petition for Rehearing, again mentioned generally the Fourteenth Amendment to the Constitution of the United States in summarizing the earlier pleadings (Appellant's Reply to Response by the City of Louisville, p. 2), but failed to present any argument that KRS 93.360 was in violation of the Constitution of the United States.

There is not even a showing by petitioner that the decision of the Court of Appeals of Kentucky necessarily involved the determination of a federal question. This Court has enunciated a policy of not considering questions not presented to or decided by courts below. This Court stated in *McGoldrick* v. *Compagnie Generale Transatlantique,* 309 U. S. 430, 60 S. Ct. 670, 84 L. Ed. 849:

> "In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should

> lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court. 309 U. S. at 434."

See also, *McGoldrick* v. *Gulf Oil Corporation,* 309 U. S. 2, 60 S. Ct. 375, 84 L. Ed. 536; *McQuade* v. *Inhabitants of the City of Trenton,* 172 U. S. 636, 19 S. Ct. 293, 43 L. Ed. 581.

Presentation of a federal question to the state court and its decision of the question are essential for jurisdiction to obtain in this Court:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. *Lynch* v. *People of the State of New York,* 293 U. S. 52 at 54, 79 L. Ed. 191 at 193."

Petitioner in his Amended Answer in the court of first instance invoked only in general terms the protection of the Fourteenth Amendment, but did not make any specific allegation or any arguments of any conflict between the Kentucky statute and the federal Constitution at any stage of the proceedings in the Court of Appeals of Kentucky. Respondent submits that by failing to do so petitioner lost his privilege of further review.

III.

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW.

Was the Court of Appeals of Kentucky correct in applying the law as found in *Henderson* v. *City of Lexington,* 132 Ky. 390, 111 S. W. 318, and affirming the judgment of the Jefferson Circuit Court upholding the action taken by the City of Louisville?

Respondent submits the answer to this question is YES.

IV.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED.

No statutes, constitutional provisions or rules other than those mentioned above or other than those cited by petitioner are directly involved in this proceeding. Respondent submits that KRS 93.100, KRS 416.120 and KRS 65.010, cited by petitioner, are inapplicable to the question before this Court.

V.

STATEMENT OF THE CASE.

The facts material to the consideration of the Petition for Certiorari are contained in petitioner's brief under the headings "Opinions of the State Courts" (pages 2-5) and "Statement of the Case" (pages 14-23). Respondent urges, however, that many of the facts presented are not pertinent to the question which this Court is called upon to decide at this time. In addition, petitioner has included in his Statement of the Case argument on the merits, conclusions and his interpretations of the law, none of which respondent undertakes to affirm or contradict at this time. Respondent, however, does not wish to be understood as intending to waive the right to add to or contradict such Statement of the Case should certiorari be granted.

Petitioner's Statement of the Case is defective in that it does not comply with United States Supreme Court Rule 23 (f), 28 U.S.C.A. Petitioner does not in his Statement of the Case specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised, the method of raising them, and the way in which they were passed upon by the court. Petitioner has failed to show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari, as is required by said Rule 23 (f).

VI.

REASONS RELIED UPON FOR DENIAL OF WRIT AND SUMMARY OF ARGUMENT.

Respondent contends that the Petition for Writ of Certiorari should be denied for the following reasons:

(A.) Review at this time would be premature. The court of first instance has not yet tried the question of damages. Damages, if any, must be determined by a jury and paid to each objecting landowner, or into court, before the court can direct the closing of an alley. KRS 93.360(3). The court of first instance has scheduled the trial on the question of damages for June 16, 1970. Until damages have been ascertained and the portion of the alley closed, the judgment is not final for purposes of review.

(B.) No federal question was presented to the Court of Appeals of Kentucky.

(C.) Petitioner has requested a writ of certiorari to the Court of Appeals of Kentucky and to the Jefferson Circuit Court. The Jefferson Circuit Court is the court of first instance and not the highest court of Kentucky to consider this case. Hence, under 28 U.S.C. § 1257, its judgment is not reviewable by certiorari.

(D.) The questions sought to be raised herein are not of sufficient substance, importance or gravity to require granting the writ. United States Supreme Court Rule 19(1)(a), 28 U.S.C.A., provides:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will

be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which, will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

Petitioner has failed to show any "special and important reasons" for granting the writ and that there exists a "federal question of substance".

(E.) Petitioner's arguments are without merit:

(1.) KRS 93.360 does not violate the Fourteenth Amendment to the Constitution of the United States. The statute provides a method whereby owners of land may be compensated for any diminution in the market value of their property caused by the closing of the public way. The statute expressly conditions the closing upon *payment* of the compensation so determined by jury. Because petitioner did not specify his constitutional objections to the state statute, respondent is unable to answer his objections in any detailed analysis, but, respondent submits that the closing pursuant to KRS 93.360 results in neither a deprivation of property without due process of law or unequal protection of the laws.

(2.) The decision of the Court of Appeals of Kentucky is completely in accord with the law in Kentucky. In *Henderson* v. *City of Lexington,* 132 Ky. 390, 111 S. W. 318, the Court of Appeals of Kentucky inter-

preted and upheld an earlier statute regulating the closing of public ways in smaller class cities. The statute interpreted in that decision and KRS 93.360 are substantially identical in language and exactly identical in effect.

(3) Petitioner's third argument concerns the medium of payment of compensation determined by the jury. Petitioner raises this question for the first time in this Court. He did not present this question in the Court of Appeals of Kentucky and should not be entitled to raise it now. In any event, since KRS 93.360(3) expressly conditions the closing of a public way "upon payment to each defendant of the damages awarded to him", petitioner's argument becomes moot.

VII.

CONCLUSION.

This action involves the closing of an alley by the City of Louisville and payment to the objecting landowners of compensation as prescribed by state statute. The court of first instance allowed petitioner to attempt to prove that the closing did not serve a public purpose. He failed to prove a lack of public purpose and appealed to the highest court in Kentucky. The appellate court affirmed and the action is now back in the court of first instance to be tried on the question of damages.

Petitioner has confused the status of the action by citing inapplicable statutes and arguing cases that are valid but have no application to the present facts. His

argument is not convincing that further review is important. Only in the court of first instance did he assert rights generally under the Constitution of the United States, but failed to specify where the circumstances of this action deprived him of any rights. He has shown no error.

In view of the often announced policy of this Court to exercise sparingly the power of certiorari, respondent respectfully submits that this case is not of the character for which certiorari should be granted, and that, therefore, petitioner's request for such a writ should be denied.

Respectfully submitted,

JAMES E. THORNBERRY,
Director of Law,
City of Louisville,
Room 200, City Hall,
Louisville, Kentucky 40202,

Attorney for Respondent, City of Louisville.

CERTIFICATE OF SERVICE.

The undersigned certifies that he has served this RESPONSE TO PETITION FOR WRIT OF CERTIORARI upon all parties required to be served by depositing a copy thereof in a United States mail box, with first class postage prepaid, addressed to the following: Felix J. Sanders, Jr., Attorney for Equitable Federal Savings & Loan Association, 209 South Fifth Street, Louisville, Kentucky, 40202, Blakey Helm, Attorney for William E. Barth, Jr., 606 Louisville Trust Bldg., Louisville, Kentucky, 40202, Mr. Thomas James, Attorney for William E. Barth, Jr., Kentucky Home Life Building, Louisville, Kentucky, 40202, Mr. D. H. Robinson, Attorney pro se and for Edward F. Rectenwald, 310 West Liberty, Louisville, Kentucky, 40202, Mr. Marshall P. Eldred, Jr., Attorney for Eli Brown and Sons, Inc., 231 South Fifth Street, Louisville, Kentucky, 40202, this 3rd day of June, 1970.

James E. Thornberry